LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Okay, its 9:02 on my official clock, so we are going to get started. Michelle, if you can mute the telephone, please. Thank you. Alright, well good morning everybody and welcome and this is our first telebrief of 2017. Hard to believe, I know we started this, I think in 2014, so we have been doing it for a while and, hopefully we will continue and see some interesting stuff that goes on in 2017, which I have no doubt about it in the Labor & Employment field. It will be interesting as we all know to see what happens in the next year to four years under the Trump administration when it comes to Labor & Employment Law; there are certain trends that we will be talking about probably throughout 2017.

One of the things that came about over the weekend was that the State of Kentucky became the 27th state in the United States to pass a statewide Right-to-Work Act. Now you might say what difference does it make what Kentucky does or the other 26 states when it comes to a Right-to-Work Act? I want to make sure everybody out there understands what a Right-to-Work Act is.

A Right-to-Work Act says that it is no longer permissible between a union and a company that have a collective bargaining relationship for the union and company to agree that as a condition of employment, an employee in the bargaining unit must pay union dues in order to continue employment. As some of you know out there particularly those of you with unionized employees under the National Labor Relations Act, the Federal Act, it is permissible to have a union security provision, which basically states that in order to continue employment an employee and a bargaining unit must continue to pay union dues. Well, Kentucky has joined neighboring states of Michigan, Wisconsin and West Virginia, which have all recently passed right-to-work laws. Frankly, under the Trump administration, I think that it is no secret that this may be on the radar screen of a Republican Congress. Mitch McConnell has been quoted as saying right-to-work is a smart way to get America on the path to real recovery, and it is critical to empowering workers and giving them more freedom to keep more of their hard-earned dollars to spend as they choose. This is why I have continually supported legislation at the federal level to enact right-to-work nationwide. Trump, himself has in the past repeatedly supported right-to-work legislation. While Kentucky certainly is not a neighboring state of most of your businesses, I indicate that as a trend, we may very well see legislation introduced into Congress under a Trump administration, which would amend the National Labor Relations Act and make it illegal nationally, as well as on a statewide basis to have union security provisions mandating that employees contribute or pay union dues as a condition of employment.

I want to make sure that everybody understands there is a difference between right-to-work and the doctrine of employment- at will. They are not related, some people get them conflated or confused, right-to-work is as I have

explained, employment at will simply is a doctrine which indicates that employees have the right to leave a company to resign a company at any time for any reason with or without notice and employers have the right to terminate an employee for any reason with or without notice. The two doctrines are different and often times they are confused, so stay tuned on the national circuit as we will be paying attention to legislation introduced into Congress during the Trump years.

There is an interesting development that I wanted to bring to your attention. Everybody knows that in terms of the white collar salary exemption rules, they are currently stayed pending an appeal in the circuit court, which includes Texas. As you know, the Department of Labor under Tom Perez enacted these new white collar exemption rules, which were to have taken place or taken effect as of December 1st. They were enjoined by a Federal District Court judge in Texas and that case was appealed by the Department of Labor. As you know or may not know, just because on the federal level, wage and hour laws are of one kind, the states always can enact their own wage and hour laws, which may be more generous to employees. A prime example of that is that as of December 31st, couple of weeks ago, The New York State Department of Labor implemented its own salary rules and thresholds for exempt employees for overtime purposes. Even though federally, we do not exactly know how the Department of Labor appeal will shake out or whether the Department of Labor under a new Secretary of Labor will even implement or rescind those regulations, we do know that states have the right to implement their own white collar exemption rules. Under the New York rules that went into effect on December 31st what they do is they break it down into categories, so there are categories for New York City for those employers who have a 11 or more employees, New York City for those employers who have less than 11 employees, Nassau, Suffolk and Westchester counties and the remainder of the state. As of December 31, 2016, for those employers in New York City that have more than 11 employees, the new white collar exemption is $825, which equates to $42,400. That will move on December 31, 2017 to $975, which equates to an annual salary of $50,700. As of next year at this time, December 31, 2017, in New York City irrespective of whatever happens or does not happen at the federal level, the white collar exemption salary level will be $50,700, which of course is about $3,000 higher than what the Federal Department of Labor had envisioned if its regulations went into effect as of December 1, 2016.

I point this out because even though we may see a rolling back of regulations on the federal side under the Department of Labor under the Trump administration, there is nothing that would inhibit states from passing their own wage and hour laws, which are more generous to employees than those under the federal level. Those of you out there who do business in Maryland, Virginia, District of Columbia, Pennsylvania, etc., you got to pay attention to what is going on at the state level because even though there may be relief for employers at the federal level under Trump administration, there is nothing to indicate that states may not have their own more generous or more liberal statutes or ordinances that are passed that are more favorable to employees.

Some people have asked well, what may happen under a Trump administration at the Equal Employment Opportunity Commission. There are several things that may happen; I will just mention a couple. The General Counsel for the Equal Employment Opportunity Commission, David Lopez, left the agency late in 2015 and his successor who is now Jenny Yang, her term expires in July, which means that there will be a new General Counsel at the EEOC sometime late summer. The General Counsel in many cases determines the direction and the vision of the Equal Employment Opportunity Commission when it comes to enforcement actions and, of course, with Trump being a Republican, we know there will be a Republican appointed as the chair of the Equal Employment Opportunity Commission, which may mean that those class action lawsuits that have sort of proliferated during the Democratic General Counsel's chair and tenure may be rolled back and the budget may be rolled back from a Republican Congress.

I think one thing that certainly may be on the chopping block and we talked about this in a prior telebriefs back in the fall, which was then in September, the EEOC finalized a regulation, which would change the reporting requirements for those of you who file EEO1 reports. As you know, the EEO1 report requires employers with a 100 or more employees to submit various reports to the Equal Employment Opportunity Commission breaking down your workforce into different classifications, but in September the EEOC mandated that beginning in 2018 not only would you be required to include data, which would break down ethnic and gender classifications, but you would also have to include very complex pay data and certainly the hidden agenda here on part of the EEOC was that when this would go into effect in 2018, it would give the EEOC grist for the mill to probably file more class action lawsuits on the basis of class wide gender discrimination, sex discrimination, etc. I think that this regulation may very well be on the chopping block when you get a new EEOC General Counsel and again with a Republican Congress and with an already articulated vision by Trump during the campaign and now with a Republican Congress, I think that you are going to see that many of these regulatory actions, which were enacted during the Obama administration whether they were at the Department of Labor, whether they were at the Equal Employment Opportunity Commission, will either be modified or rolled back so stay tuned for that because again, given a new general counsel, which will take place late summer 2017 we know that that general counsel will come in with his/her own initiative, which I think will probably be coterminous and consistent with what Trump indicated during his campaign.

Again, speaking about the EEOC, just yesterday the EEOC, and this was on its website, issued or distributed a proposed set of enforcement guidelines for how it intended to address harassment under the Federal Employment Discrimination Laws. It is a 75-page guidance, a long guidance, which sets forth how the agency would interpret the federal laws pertaining to harassment in the workplace. What they indicated on the website is that they would be looking at and the guidance would address whether the alleged conduct was

based on the complainant's legally protected status, whether the conduct was sufficiently pervasive or severe for a determination that a hostile work environment was created as most of you know that under Title 7 if you are talking about workplace harassment irrespective of the basis, whether it is based on religion, sex, national origin, etc., it is usually not actionable unless it is pervasive and severe enough to change the objective terms and conditions of employment for an employee. The last thing that the EEOC said that they would be taking a look at is whether a basis exists for holding an employer liable for the environment according to that proposed guidance. The EEOC Commissioner Feldblum stated as follows on the website. This guidance clearly sets forth the commission's positions on harassment law, provides helpful explanatory examples and provides promising practices based on the recommendations in the report. He went onto say, I believe it will be a helpful resource for employers and employees alike, and I look forward to receiving comments from the public. These comments will be accepted through February 9th. Now again, this may be a lame duck initiative because we do not know how forceful a new general counsel will be or a new commission will be under the Republican administration, but right now, those of you out there who seek guidance on workplace harassment are invited to go to the EEOC's website again. It is a very long document, but it is a pretty complete document and frankly, whatever happens at the EEOC during the next year or four years, we know that it is a matter of good employee relations it behooves you to have effective workplace harassment policies in place and not only policies in place but workplace training policies that regularly revisit the issue with your employees and make sure that your rank and file employees as well as your supervisory staff know how to use the process, how it works and what kind of relief and remedies may be available both for employees and for a supervisory staff that intended to investigate complaints of workplace harassment in the workplace. I always think that the beginning of a year is a good time to take stock of what your policies are, how they are working or not working, and whether you need to make improvements either in the substantive aspects of your policy or in the training aspect of how they are communicated and disseminated to your employees.

While we're talking about the EEOC and those kinds of issues, I wanted to mention that on January the 22nd very soon there will be a new ordinance, which becomes effective in Los Angeles called the Fair Chance Initiative Ordinance. Basically this is a sort of Band-the-Box legislation where it goes pretty far and outlawing employers from inquiring into the criminal history or background of an applicant until a conditional offer of employment has been made. The reason I bring it up is not because many of you probably do business in Los Angeles, but embodied in this particular statute is what the LA legislature calls a fair chance process, which gives the applicant an opportunity to provide information regarding the accuracy of the supposed criminal history. In this process it requires the employer to conduct an actual written assessment that connects or provides a nexus between the aspects of the criminal history and the aspects or the duties of the position sought. I would remind you, those of you where you do business and they do not have Band-the-Box legislation, it is

under the EEOC's prior guidance. Those of you who inquire into prior criminal history, you know, that you always want to look at three essential elements, if you come up with a positive regarding an employee's criminal history, and that is what's the nature or the seriousness, the offense or the misconduct that may have been involved? Obviously, there is a difference between offenses where there may be violence attached to it, whether somebody was guilty of assault or attacking another individual or a simple shoplifting offense that may have occurred 15 years ago.

The second thing that you want to take a look at is the length of time, which has passed since the particular offence was committed and the time now that the particular applicant is looking to come to your place of work. Obviously, the longer the passage of time, the more attenuated and the less serious it may be with regard to whether or not you want to offer a job to the particular applicant.

Lastly, thirdly, according to the EEOC, and I think common sense is, what is the nature of the job that you are looking to fill? Obviously, if you have somebody who may have been guilty of embezzlement 10 years ago and the applicant is looking to fill the position in a banking position or a financial position that may have a lot more relevance than someone whose offense was a drug possession 20 years ago and where the employee's position may have nothing to do with that for which he is applying. I always advise a client when looking at criminal backgrounds and anything that comes up positive; it has to be an individualistic analysis. You want to certainly look at the nature of the act, how long ago did it happen, what is the connection with the particular job. If you come up with a positive, I think that as a matter of due process, as a matter of explanation in some cases you may want to hear it from the applicant, get an explanation of what happened, what were the facts and circumstances. In some cases, I have even advised clients to have the counsel talk to the attorney who may have handled the case on behalf of the applicant to find out what really happened. Because sometimes applicants do not have all of those facts, they may not report them as accurate, or the criminal information that you get may not be totally complete and sometimes you want to get a more complete explanation as to what may have happened with that particular applicant in the past which warranted the criminal conviction. There are those circumstances where for instance it may be reported as a stip meaning the State decided not to go further in the prosecution of the case or what's called a nolle pros where they decided not to prosecute, but nevertheless it is a fact and circumstance that you may want to get more detail about.

Those are the developments of the day. Michelle can you take it off on mute please? Okay, I think we have a couple of new participants. Certainly, the way I usually conduct these telebriefs is if anybody has any question or comments, feel free to bring them up now. Otherwise, you can get me at my telephone number (410) 209-6417 or my email address at hkurman@offitkurman.com. Any questions or comments out there on anything that has been covered?

Anne: Yeah, Howard, this is Anne. If there was a…

Howard Kurman: Hi, Anne.

Anne: …an…hi. If there were an amendment to the NLRA...

Howard Kurman: Right.

Anne: …providing that union membership and dues payment cannot be forced as requirement to retain the job that could…

Howard Kurman: Right.

Anne: …that would override any state attempts to not be right-to-work, right?

Howard Kurman: it would be, yes. Under the Supremacy Clause, the federal act would preempt any state law, which would allow a union security provision. So it's sort of a converse…

Anne: Right.

Howard Kurman: …of what's going on right now where you have state's passing their own right-to-work statutes. So yes, it would preempt those particular states.

Anne: I mean that would be a game changer for certain employees.

Howard Kurman: It would be a game changer and probably would be the death knell of many unions who are already experiencing financial problems, but where their savior is the opportunity to collect regular dues because if they do not have dues money that is regularly submitted by employers good luck, you know, going around and chasing employees asking them if they voluntarily want to pay union dues.

Anne: Yeah, yeah. I mean some people would, but it would really be a financial strangle.

Howard Kurman: It would be a financial strangle, and as I said, could very well be the death knell of some unions.

Anne: Yeah, and I think that has a good chance of passage now with the makeup of the Congress.

Howard Kurman: Well, you have a President and a Congress who, you know, have articulated support for that so, we are just going to have to wait and see.

Anne: Yeah.

Howard Kurman: Any other questions or comments out there? Okay, well, as always the labor and employment field is dynamic. Those of you who have participated for a long time in this know that two weeks is actually a long time in the timeline for Labor and Employment Law. We will gather again on the fourth Wednesday of January which by my calendar, I am not sure of yours, is January the 25th. To everybody, have a good next two weeks and hopefully we will all see each other if only by telephone on the 25th. Thanks everybody.